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15
16 MONTANA FIRST JUDICIAL DISTRICT COURT
17 COUNTY OF LEWIS AND CLARK

18 LARRY WHITE, CANDACE BERGMAN, DAVID
19 CHASE, MICHAEL SHIELDS, KENNETH
20 INGRAHAM, GARY ACKERMANN, and DANIEL
21 FINLEY

22 Plaintiffs,

23 vs.

GOVERNOR JUDY MARTZ, ET AL.,

Defendants.

No. CDV-2002-133

**STIPULATION AND ORDER
OF POSTPONEMENT OF
TRIAL**

24
25 WHEREAS, by Complaint dated February 14, 2002, Amended Complaint dated April 1,
26 2002, and Second Amended Complaint dated January [8], 2004 (hereinafter "the complaints"),
27 Plaintiffs filed suit against State Defendants Governor Judy Martz; Supreme Court Administrator

1 James Oppedahl; Appellate Defender Commissioners Todd Hillier; Dorothy McCarter, Beverly
2 Kolar, Michael Sherwood, and Randi Hood; District Court Council Members Chief Justice Karla
3 Gray, District Court Judge Katherine R. Curtis, District Court Judge Thomas McKittrick, District
4 Court Judge John McKeon and District Court Judge Ed McLean; and Missoula County
5 Defendants the Board of Commissioners of Missoula County and Missoula County
6 Commissioners Barbara Evans, Bill Carey and Jean Curtiss; and

7 WHEREAS, the complaints alleged, among other things, that Defendants have failed to
8 provide the public defender programs in Montana counties Butte-Silver Bow, Flathead, Glacier,
9 Lake, Missoula, Ravalli, and Teton with the administrative and financial resources necessary to
10 ensure that lawyers employed by those programs were capable of providing statutorily and
11 constitutionally adequate legal representation; and

12 WHEREAS, Defendants the Governor, the members of the Appellate Defender
13 Commission, the Board of Commissioners of Missoula County and the Missoula County
14 Commissioners filed motions to dismiss that were each denied in their entirety by the Court on
15 July 24, 2002; and

16 WHEREAS, an order granting class certification was signed on June 26, 2002, certifying
17 a class of plaintiffs to be maintained against the State and then-County Defendants Butte-Silver
18 Bow, Flathead, Glacier, Lake, Missoula, Ravalli and Teton of all indigent persons who had or
19 would have cases pending in the district courts of those counties and who relied upon those
20 counties and the relevant county commissioners to provide them with defense counsel as of the
21 date of the order; and

22 WHEREAS, Defendants filed answers to Plaintiffs' Complaint on August 13, 2002 and to
23 Plaintiffs' Amended Complaint on January 24, 2003, and Missoula County Defendants filed an

1 answer to Plaintiffs' Second Amended Complaint on January 26, 2004 that denied all liability
2 with regard to Plaintiffs' claims and the remaining Defendants have yet to answer the Second
3 Amended Complaint; and

4 WHEREAS, Plaintiffs conducted extensive discovery, including taking the depositions of
5 over eighty witnesses, including current and former public defenders from each of the seven
6 counties at issue, various state and county officials, and members of the Appellate Defender
7 Commission; and

8 WHEREAS, a pre-trial scheduling order was signed by the Court on December 12, 2003;
9 and

10 WHEREAS, Plaintiffs provided Defendants with Plaintiffs' expert witness disclosures on
11 February 13, 2004, February 27, 2004 and March 8, 2004, a list of intended trial witnesses on
12 April 1, 2004, and a list of intended trial exhibits and deposition designations on April 2, 2004 in
13 accordance with the pre-trial scheduling order; and

14 WHEREAS, Defendants provided Plaintiffs with Defendants' expert disclosures on
15 March 26, 2004, a list of intended trial witnesses on April 1, 2004, and a list of intended trial
16 exhibits on April 2, 2004; and

17 WHEREAS, the pre-trial scheduling order set a trial date of May 17, 2004; and

18 WHEREAS, the Parties understand that the Montana State legislature must be included in
19 the formulation of any remedy addressing Plaintiffs' complaints; and

20 WHEREAS, the Parties are interested in resolving the issues alleged in the complaints in
21 the above-captioned action ("Action") and have negotiated in good faith for that purpose; and

22 WHEREAS, the parties to the Action are desirous of postponing the trial date set for this
23 litigation in the hopes that such a trial will be made needless by the Montana State Legislature's

1 passage, during its 2005 legislative session, of a bill that adequately addresses the inadequacies in
2 the indigent defense system as alleged in Plaintiffs' complaints; and

3 IT IS HEREBY STIPULATED AND ORDERED, by the parties, through
4 undersigned counsel THAT,1)

5 2. A properly funded state-wide public defender system with sufficient
6 administrative and financial resources is necessary to ensure that indigent criminal
7 defendants receive constitutionally and statutorily adequate legal representation.

8 3. State Defendants, including the District Court Council and the Governor,
9 individually and by and through their counsel, the Attorney General's Office, agree to work
10 aggressively for the passage of legislation during the 2005 Montana State legislative session
11 that provides for such a system.

12 4. To permit State Defendants to do such work, the Parties agree to adjourn the
13 trial date in this Action from May 17, 2004 to May 31, 2005 unless Plaintiffs determine,
14 prior to the commencement of the 2005 legislative session, that the amount of funding the
15 Legislative Fiscal Analysts ("LFA") intends to recommend for the proposed state-wide
16 public defender system is inadequate.

17 5. 2) **In the event that Plaintiffs' counsel and the National Legal Aid
18 and Defenders Association ("NLADA") determine the amount of funding proposed by
19 the LFA is inadequate, trial shall commence at the earliest available trial date after the
20 date of such determination.**

21 6. 3) **In the event that the Montana state legislature fails to enact
22 legislation, during the 2005 legislative session, that establishes a state-wide public
23 defender system with the resources necessary to enable attorneys employed by that
system to provide statutorily and constitutionally adequate legal representation, the**

1 **Action will go to trial on May 31, 2005 on the issue of Defendants' liability and the**
2 **adequacy of the remedy. If the Court finds at trial that Defendants were violating**
3 **Plaintiffs' constitutional and statutory rights as of May 17, 2004, it may enter a**
4 **judgment of liability against Defendants.**

5 7. In the event that the Montana state legislature enacts legislation, during the
6 2005 legislative session, that provides for the adequate framework of a state-wide public
7 defender system but fails to provide that framework with the necessary funding, this Action
8 will will go to trial on May 31, 2005 on the issue of the adequacy of funding. Defendants
9 will not admit liability in the event of such a trial, but will admit that the deficiencies
10 articulated in Plaintiffs' complaints necessitated a properly funded state-wide public defender
11 system with sufficient administrative and financial resources to ensure that indigent criminal
12 defendants receive constitutionally and statutorily adequate legal representation.

13 8. 4) **In the event that the Montana State legislature enacts legislation**
14 **that provides for a statutorily and constitutionally adequate public defender system**
15 **and fully and adequately funds that system, the Parties agree to dismiss this Action.**
16 **In the event of such a dismissal, Plaintiffs reserve the right to seek attorneys' fees and**
17 **costs and Defendants will not argue that Plaintiffs are not entitled to such fees and**
18 **costs because they were not the prevailing party.**

19 **The State-Wide Indigent Defense System**

20 9. The state-wide public defender system for which Defendants, individually
21 and by and through undersigned counsel, the Office of the Attorney General, shall advocate
22 during the 2005 legislative session shall provide representation in felony, misdemeanor,
23 juvenile, mental health and appellate matters.

1 10. A statutorily and constitutionally adequate indigent defense system in
2 Montana must operate according to the NLADA 10 Principals (attached hereto as Exhibit A)
3 and Defendants shall advocate throughout the legislative process for such a system.

4 11. SB 218, as modified by the ACLU in the 2003 legislative drafting session
5 (attached hereto as Exhibit B), will serve as the starting point for any new legislation.

6 12. 5) **The legislative remedy shall contain in the preamble an indication**
7 **that the bill was passed in order to satisfy Montana's constitutional and statutory**
8 **obligations.**

9 13. 6) **Defendants will consult with Plaintiffs' counsel and the NLADA**
10 **throughout the legislative drafting process.**

11 **Funding**

12 14. In order to fund adequately a state-wide public defender system in Montana, a
13 legislative appropriation of no less than \$15-20 million per annum will be necessary.

14 15. Any legislation instituting a state-wide public defender system in Montana
15 should aim to achieve parity between funding for indigent defense and funding for
16 prosecutorial functions. State employees engaged in indigent defense should be
17 compensated at a rate and have resources comparable to similarly situated state employees
18 engaged in prosecutorial roles.

19 16. Funding for a state-wide system shall be included as a line item in the
20 Attorney General's budget, which shall be submitted to the legislature via the Executive
21 Planning Process ("EPP").

22 17. The Attorney General's Office shall work with Plaintiffs' counsel to compile
23 an EPP submission requesting \$20 million per annum, to be submitted in time for the
Legislative Fiscal Analysts ("LFA") to make a transparent and full assessment of the costs of
the proposed system for the 2005 Montana State legislative session.

1 18. The Attorney General's Office shall confer and consult with Plaintiffs'
2 counsel and the NLADA in working with the LFA as the LFA conducts its assessment of the
3 costs of the proposed state-wide indigent defense system.

4 19. Costs associated by the participation of the NLADA in the legislative
5 appropriations process shall initially be paid by Plaintiffs' counsel, who reserve the right to
6 recover such costs from Defendants at the conclusion of this litigation.

7 20. The EPP submission approved by the LFA in the Attorney General's Office
8 budgetary submission to the legislature shall be binding upon the Attorney General's
9 successor if the amount is no less than \$15 million per annum.

10 21. In connection with the legislative appropriations process, the Governor's
11 office shall also submit an estimate of a fully and adequately funded state-wide indigent
12 defense system. That submission will be made after a full and transparent assessment of the
13 costs and shall be binding upon the Governor's successor if the amount recommended is no
14 less than \$15 million per annum.

15 22. The Attorney General's Office shall advocate throughout the legislative
16 appropriation process, including the LFA analysis and the cost estimate analysis conducted
17 by the Governor's office, for full and adequate funding for the proposed indigent defense
18 system.

19 7) **NLADA's Role**

20 8) 9) **The NLADA shall play an active role throughout the legislative
21 process of creating a properly funded state-wide public defender system.**

22 23. 10) **Defendants may not use the fact of the NLADA's involvement
23 with the legislative process to disqualify it from serving as Plaintiffs' expert witness in
the event that a trial becomes necessary.**

1 24. Defendants may not introduce or use at trial any statements made by the
2 NLADA after May 17, 2004 in the event that a trial becomes necessary.

3 11)

4
5 **Missoula**

6 25. Defendants shall take immediate steps to address the current situation in the
7 Missoula County Public Defender Office including, but not limited to,

8 · directly funding a position for a managing attorney to administer the
9 Missoula Public Defender Office,

10 · funding an intensive six-month training program (including a trial
11 advocacy component) designed by the NLADA for all attorney and
12 para-professional staff

13 · purchasing and implementing a computerized case tracking system

14 · funding additional staff sufficient to ensure that caseloads meet
15 national standards, including but not limited to, attorneys, investigators,
16 secretaries, paralegals, and social workers

17 · ensuring that public defenders in the office meet with clients within
18 48 hours of arrest

19 **Discovery Issues**

20 26. Plaintiffs' counsel will continue to take discovery until completed. The
21 Parties agree that remaining deposition discovery should be completed by May 17, 2004.

22 Such discovery will include taking the outstanding fact discovery depositions of Colleen

23 Ambrose and Ann Mary Dussault; the deposition of Defendants' expert, Barry Mahoney; and

the depositions of Defendants' intended trial witnesses Joe Coble, George Corn, Ed

Corrigan, Samm Cox, Larry Epstein, Robert Long, Karen Townsend, Margaret Borg, Alice

1 Kennedy, Judge Kurt Krueger, Judge Jeffrey Langton, Judge John Larson, Judge C.B.
2 McNeil, and Judge Stewart Stadler.

3 27. Defendants' counsel shall take no further discovery unless and until a trial
4 commencing on May 31, 2005 or earlier becomes necessary. In the event that a trial is
5 scheduled, discovery by Defendants' counsel shall be limited to depositions of Plaintiffs'
6 expert witnesses and certain of the clients upon whose files Plaintiffs' expert witnesses rely.
7 Such depositions shall relate exclusively to facts in existence prior to May 17, 2004.

8 28. Defendants will bear the risk that the client witnesses they seek to depose are
9 no longer available, for whatever reason, at the time Defendants seek to depose them.
10 Defendants may not ask the Court to draw any adverse inferences on the basis of the
11 unavailability of such witnesses.

12 29. Plaintiffs will postpone taking the depositions of Defendants' trial witnesses
13 Judge Kurt Krueger, Judge Jeffrey Langton, Judge John Larson, Judge C.B. McNeil, and
14 Judge Stewart Stadler until a trial date has been set if those witnesses, by and through their
15 counsel, the Attorney General's Office, sign the stipulations Plaintiffs' counsel have
16 proposed. (Attached hereto as Exhibit C.) Further details regarding the depositions of
17 these witnesses are to be negotiated.

18 30. The parties shall enter into a pre-trial stipulation of undisputed facts 45 days
19 prior to a date certain for a trial on this Action.

20 31. The parties shall enter into a pre-trial stipulation to the authenticity of
21 documents 45 days prior to a date certain for a trial on this Action.

22 32. With the exception of Defendants' depositions of Plaintiffs' experts and
23 certain clients, no further discovery by either party shall be permitted after May 17, 2004.

1 33. With the exception of Defendants' depositions of Plaintiffs' experts and
2 certain clients, no evidence post-dating May 17, 2004 will be admissible at trial in 2005,
3 should such a trial be necessary.

4 34. Defendants will not assert as a defense at trial, or in any motion to modify, set
5 aside or amend a court order entered prior to trial, that meaningful change has occurred in
6 Montana's indigent defense system between May 17, 2004 and the trial date.

7 35. Based on the preceding stipulations, the parties agree to postpone the
8 current trial date of May 17, 2004 to May 31, 2005 should Plaintiffs determine a trial is
9 necessary. Nothing in this Stipulation and Order shall preclude either party from seeking a
trial date prior to May 31, 2005.

10 36. This Stipulation and Order shall have no effect on any claims that may
11 be made by or on the behalf of individual members of the plaintiff class for damages or in
12 direct or collateral review of any criminal conviction or adjudication by way of appeal or
13 writ of error, in any sentence review proceeding, in any post-conviction relief proceeding, or
14 in any habeas corpus proceeding arising out of a criminal conviction or adjudication.

15 Dated: April __, 2004

16 GOUGH,
17 SHANAHAN, JOHNSON &
 WATERMAN

18 by
19 _____
 RONALD F.
 WATERMAN

20 AMY RANDALL
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12 COUNSEL FOR
13 PLAINTIFFS

14 IT IS SO ORDERED:

15 Dated: Helena, Montana
16 April __ 2004

17

18 HONORABLE THOMAS HONZEL
19 Montana State District Court Judge

20 CERTIFICATE OF SERVICE

21 I hereby certify that a copy of the within and foregoing was mailed, with
22 postage fully prepaid thereon, at Helena, Montana, on the __ day of April 2004, and directed to
23 the following:

24 Brian Morris
25 Civil Services Bureau
26 Attorney General of Montana
27 P.O. Box 201401
28 Helena, MT 59620-1401

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